

CRIMINAL YEAR SEMINAR

April 15, 2016 - Tucson, Arizona
May 6, 2016 - Phoenix, Arizona
May 13, 2016 - Chandler, Arizona



2015 CRIMINAL SUBSTANTIVE LAW UPDATE

Presented By:

The Honorable Michael R. Mcvey (Retired)

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Criminal Substantive Law Update

The Honorable Michael McVey, Retired Judge of the Maricopa County Superior Court
Joseph T. Maziarz, Assistant Arizona Attorney General

• 13-206. Entrapment

- A. It is an affirmative defense to a criminal charge that the person was entrapped. To claim entrapment, the person must admit by the person's testimony or other evidence the substantial elements of the offense charged.
- B. A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:
 - 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
 - 2. The law enforcement officers or their agents urged and induced the person to commit the offense.
 - 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.
- C. A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment.
- *State v. Williamson*, 236 Ariz. 550, 343 P.3d 1 (App. 2015) (Post Conviction Relief Granted in Part)
 - Issues:
 - What is the difference between the constitutional claim of outrageous government conduct and the statutory affirmative defense of entrapment?; and
 - What must the Defendant allege and prove in order to be entitled to an entrapment instruction?
- *State v. Gray*, 238 Ariz. 147, 357 P.3d 831 (App. 2015) (Petition for Review Granted on February 9, 2016)
 - Issues:
 - Is a defendant's decision not to challenge the state's evidence during trial an admission of "the substantial elements of the offense charged"?; and
 - Can statements made on an audio recording during the course of the offense constitute an admission of "the substantial elements of the offense charged," entitling the defendant to an entrapment instruction?

• 13-404. Justification: self-defense

- A. Except as provided in subsection B of this section, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.
- B. The threat or use of physical force against another is not justified:
 - 1. In response to verbal provocation alone; or
 - 2. To resist an arrest that the person knows or should know is being made by a peace officer or by a person acting in a peace officer's presence and at his direction, whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law;
- *State v. Vossell*, 238 Ariz. 281, 359 P.3d 1025 (App. 2015)
 - Issue:
 - What must a defendant prove in order to be entitled to a justification defense instruction?

• **13-411. Justification; use of force in crime prevention; applicability**

- A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of arson of an occupied structure under section 13-1704, burglary in the second or first degree under section 13-1507 or 13-1508, kidnapping under section 13-1304, manslaughter under section 13-1103, second or first degree murder under section 13-1104 or 13-1105, sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, child molestation under section 13-1410, armed robbery under section 13-1904 or aggravated assault under section 13-1204, subsection A, paragraphs 1 and 2.
- C. A person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of any of the offenses listed in subsection A of this section.

• **State v. Almeida, 238 Ariz. 77, 356 P. 3d 822 (2015)**

- **Issues:**
 - Is a defendant entitled to a justification defense instruction for use of force in crime prevention, even though he has already been provided a justification defense instruction for self-defense, defense of others, and the defensive display of a firearm?; and
 - Is the trial court's failure to give a justification defense instruction for crime prevention harmless error?

• **13-503. Effect of alcohol or drug use**

- Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

• **State v. Lete, 237 Ariz. 516, 354 P. 3d 393 (2015)**

- **Issues:**
 - Is temporary intoxication from the use of a psychoactive drug obtained pursuant to a medical prescription, a defense to any criminal act or required state of mind?; and
 - Is the defendant limited to his own testimony to prove he used the medication as prescribed?

• **13-703. Repetitive offenders; sentencing**

- If a person is convicted of multiple felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions, the person shall be sentenced as a first time felony offender pursuant to section 13-702 for the first offense, as a category one repetitive offender for the second offense, and as a category two repetitive offender for the third and subsequent offenses.

• **State v. Ortiz, 238 Ariz. 329, 360 P. 3d 125 (App. 2015)**

- **Issues:**
 - In order to enhance a defendant's sentence under ARS § 13-703 (A), must a jury, or the trial court determine whether one or more offenses were not committed on the same occasion but consolidated for trial?;
 - Under what circumstances can the trial court determine that one or more offenses were not committed on the same occasion, but consolidated for trial?
 - What factors must the trier of fact consider in determining whether multiple felony offenses were committed on the same occasion?; and
 - Can the trial court's decision to make findings of fact, rather than to submit those issues to a jury, be harmless error?

• **ARS § 13-705 (P): Dangerous Crimes Children: Definition**

- P. For the purposes of this section:
 - 1. "Dangerous crime against children" means any of the following that is committed against a minor who is under fifteen years of age:
 - (b) Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

• **State v. Felix, 237 Ariz. 280, 349 P. 3d 1117 (App. 2015)**

- Issue:
 - Must a defendant know the actual age of a victim when committing the offense for it to qualify as a dangerous crime against children?

• **13-714. Offenses committed with intent to promote, further or assist a criminal street gang**

- A person who is convicted of committing any felony offense with the intent to promote, further or assist any criminal conduct by a criminal street gang shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted. The presumptive, minimum and maximum sentence for the offense shall be increased by three years if the offense is a class 4, 5 or 6 felony or shall be increased by five years if the offense is a class 2 or 3 felony. The additional sentence imposed pursuant to this section is in addition to any enhanced sentence that may be applicable.

• **State v. Harm, 236 Ariz. 402, 340 P. 3d 1110 (App. 2015)**

- Issue:
 - Does the Double Jeopardy Clause of the U.S. Constitution preclude a trial court, pursuant to ARS § 13-714, from enhancing the sentence of a defendant who has threatened or intimidated another person on behalf of a criminal street gang, when that same defendant was acquitted of the offense of assisting a criminal street gang, in violation of ARS § 13-2321 (B)?

• **13-1103. Manslaughter: classification**

- A. A person commits manslaughter by:
 - 1. Recklessly causing the death of another person; or
 - 2. Committing second degree murder as prescribed in section 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim,

• **State v. Lua, 237 Ariz. 301, 350 P. 3d 805 (2015)**

- Issue:
 - Is Manslaughter under ARS § 13-1103 (A) (2) a lesser included offense of second degree murder, under ARS § 13-1104?
- Instruction to be given:
 - If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.
 - RAII (Standard Criminal) 11.04 (3d ed.)

• **13-1104. Second degree murder; classification**

- A. A person commits second degree murder if without premeditation:
 - 1. The person intentionally causes the death of another person, including an unborn child or, as a result of intentionally causing the death of another person, causes the death of an unborn child; or
 - 2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person, including an unborn child or, as a result of knowingly causing the death of another person, causes the death of an unborn child; or
 - 3. Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person, including an unborn child or, as a result of recklessly causing the death of another person, causes the death of an unborn child.
- *State v. Felix*, 237 Ariz. 280, 349 P. 3d 1117 (App. 2015)
- *State v. Juarez-Ortiz*, 236 Ariz. 520, 342 P. 3d 856 (App. 2015)
 - Issues:
 - May a trial court instruct a jury that a person is guilty of attempted second degree murder, if the person knew their conduct would cause death or serious physical injury?
 - Is the instruction of jury on a non-existent theory of criminal liability, fundamental error?

• **13-1202. Threatening or intimidating; classification**

- A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:
 - ...
 - 3. To cause physical injury to another person or damage to the property of another in order to promote, further or assist in the interests of or to cause, induce or solicit another person to participate in a criminal street gang, a criminal syndicate or a racketeering enterprise.
- *State v. Harm*, 236 Ariz. 402, 340 P. 3d 1110 (App. 2015)
 - Issue:
 - Is actual membership in a criminal street gang an element of Threatening or Intimidating?

• **13-1204. Aggravated assault; classification; definitions**

- A. A person commits aggravated assault if the person commits assault as prescribed by section 13-1203 under any of the following circumstances:
 - ...
 - 2. If the person uses a deadly weapon or dangerous instrument.
- **13-1203. Assault; classification**
 - A. A person commits assault by:
 - 2. Intentionally placing another person in reasonable apprehension of imminent physical injury;
- **13-2904. Disorderly conduct; classification**
 - A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
 - ...
 - 6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.
- *State v. Erivex*, 236 Ariz. 472, 341 P. 3d 514 (App. 2015)
 - Issues:
 - Are Assault and Disorderly Conduct, lesser included offenses of Aggravated Assault?

• **13-1204. Aggravated assault; classification; definitions**

- C. A person who is convicted of intentionally or knowingly committing aggravated assault on a peace officer while the officer is engaged in the execution of any official duties pursuant to subsection A, paragraph 1 or 2 of this section shall be sentenced to imprisonment for not less than the presumptive sentence authorized under chapter 7 of this title and is not eligible for suspension of sentence, commutation or release on any basis until the sentence imposed is served.

• **State v. Williams, 236 Ariz. 600, 343 P. 3d 470 (App. 2015)**

• **Issue:**

- Must a defendant know the victim was a peace officer engaged in the execution of official duties for this enhanced sentence provision to be applicable?

• **13-1204. Aggravated assault; classification; definitions**

- E. Aggravated assault pursuant to subsection A, paragraph 1 or 2 of this section committed on a peace officer while the officer is engaged in the execution of any official duties is a class 2 felony. Aggravated assault pursuant to subsection A, paragraph 3 of this section committed on a peace officer while the officer is engaged in the execution of any official duties is a class 3 felony. Aggravated assault pursuant to subsection A, paragraph 8, subdivision (a) of this section committed on a peace officer while the officer is engaged in the execution of any official duties is a class 5 felony unless the assault results in any physical injury to the peace officer while the officer is engaged in the execution of any official duties, in which case it is a class 4 felony.

• **State v. Pledger, 236 Ariz. 469, 341 P. 3d 511 (App. 2015)**

• **Issue:**

- Must the state prove that the defendant knew the victim was a peace officer engaged in the execution of official duties, in order to enhance the offense from a Class 3 Felony to a Class 2 Felony?

• **13-1407. Defenses**

- E. It is a defense to a prosecution pursuant to section 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to section 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

• **State v. Halle, 238 Ariz. 218, 358 P. 3d 639 (App. 2015) (Petition for Review Granted March 15, 2016.)**

• **Issues:**

- Is lack of sexual motivation an affirmative defense, or if raised by defendant, must the State prove sexual motivation beyond a reasonable doubt?; and
- Can an erroneous jury instruction that lack of sexual motivation is an affirmative defense amount to harmless error?

• **13-2508. Resisting arrest; classification; definition**

- A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
 - 1. Using or threatening to use physical force against the peace officer or another.
 - 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.
 - 3. Engaging in passive resistance.

• **State v. Jurden, 237 Ariz. 423, 352 P.3d 455 (App. 2015) (Review Granted January 5, 2016.)**

• **Issue:**

- Can a single act of resisting arrest result in two convictions for that crime without violating the double jeopardy clause, where defendant resisted the efforts of two officers to place him in custody?

• **13-3212. Child prostitution**

- A. A person commits child prostitution by knowingly:
 - 1. Causing any minor to engage in prostitution.
 - 2. Using any minor for the purposes of prostitution.
 - 3. Permitting a minor who is under the person's custody or control to engage in prostitution.
 - 4. Receiving any benefit for or on account of procuring or placing a minor in any place or in the charge or custody of any person for the purpose of prostitution.
 - 5. Receiving any benefit pursuant to an agreement to participate in the proceeds of prostitution of a minor.
 - 6. Financing, managing, supervising, controlling or owning, either alone or in association with others, prostitution activity involving a minor.
 - 7. Transporting or financing the transportation of any minor with the intent that the minor engage in prostitution.
- B. A person who is at least eighteen years of age commits child prostitution by knowingly:
 - 1. Engaging in prostitution with a minor who is under fifteen years of age.
 - 2. Engaging in prostitution with a minor who the person knows or should have known is fifteen, sixteen or seventeen years of age.
 - 3. Engaging in prostitution with a minor who is fifteen, sixteen or seventeen years of age.
- C. If the minor is fifteen, sixteen or seventeen years of age, child prostitution pursuant to subsection A and subsection B, paragraph 2 of this section is a class 2 felony. The person convicted shall be sentenced pursuant to this section and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 13-3213, subsection A or B and the sentence imposed by the court has been served or completed. The presumptive term may be aggravated or mitigated with the range under this section pursuant to § 13-701, subsections C, D and E. The terms are as follows:

• [Effective July 24, 2014 the statute was amended to delete "and subsection B, paragraph 2"]

• **State ex. Rel. Poll v. Campbell (Kreps), 238 Ariz. 109, 557 P.3d 144 (App. 2015) (Petition for Review Granted February 9, 2016)**

• **Issue:**

- Does the sentencing provision of former subsection C apply where an undercover police officer is posing as a 15 to 17 year old minor, or is it by default a "petty offense"?

• **13-3623. Child or vulnerable adult abuse**

- A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is engaged is guilty of an offense as follows:
 - 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-705.
 - 2. If done recklessly, the offense is a class 3 felony.
 - 3. If done with criminal negligence, the offense is a class 4 felony.
- B. Under circumstances other than those likely to produce death or serious physical injury to a child or vulnerable adult, any person who causes a child or vulnerable adult to suffer physical injury or abuse or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:
 - 1. If done intentionally or knowingly, the offense is a class 4 felony.
 - 2. If done recklessly, the offense is a class 5 felony.
 - 3. If done with criminal negligence, the offense is a class 6 felony.

• **State v. West, 238 Ariz. 482, 362 P.2d 1049 (App. 2015)**

• **Issue:**

- A.R.S. § 13-3623 is an "alternative means" statute. Was the defendant entitled to juror unanimity on which of the three means alleged constituted commission of the crime?

• **13-3917. Time of service; exception**

- Upon a showing of good cause therefor, the magistrate may, in his discretion insert a direction in the warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant may be served only in the daytime. For the purposes of this section night is defined as the period from 10 p.m. to six-thirty a.m.

• **State v. Fancette, 238 Ariz. 42, 356 P.3d 328 (App. 2015)**

• **Issue:**

- Was there "good cause" for issuance of a "nighttime" search warrant to search defendant's hotel room for illegal drugs?

• **13-3925(A). Unlawful search or seizure; admissibility of evidence**

- Any evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of this chapter except as required by the United States Constitution and the constitution of this state.

• **State v. Fancette, 238 Ariz. 42, 356 P.3d 328 (App. 2015)**

• **Issue:**

- If a "nighttime" search warrant was improperly issued, but there was no state or federal constitutional violation in issuing the warrant, is the evidence seized pursuant to the warrant subject to suppression?

• **13-4401 (19). Definition of "Victim"**

- "Victim" means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

• **Allen v. Sanders, 237 Ariz. 93, 347 P.3d 30 (App. 2015)**

• **Issue:**

- An affinity relationship does not exist between the blood relations of one spouse and the blood relations of the other spouse. In light of the fact that the Victims Bill of Rights should be liberally construed, should the definition of affinity be broadened to be "synonymous with marriage"?

The Honorable Michael McVey, Retired Judge of the Maricopa County Superior Court
Joseph T. Maziarz, Assistant Arizona Attorney General
